71. UNFAIR PRACTICE PROCEDURES

71.1: Filing of Charge

"… Wood is not a party in the present action. It is the union that has accused Butte-Silver Bow of an unfair labor practice. And it is the union that has brought the present action to protect its contract rights." **ULP #18-83 District Court (1985)**

71.11: Filing of Charge – Contents of Charge

"If the School District had questions about the details of what the employer was being charged with, it could have filed a motion for a more definite statement. Failure to do so does not proscribe consideration of all the facts on the record and a determination of whether such facts constitute an unfair labor practice under Section **39-31-401(1) MCA** as an independent violation aside from the alleged Section **39-31-401(5) MCA** violations." **ULP #29-84**

In **Billings School District v. Board of Personnel Appeals (1979)**, "the Montana Supreme Court held that fair notice of coercion was received by the District when the complaint stated that the District had violated Section 39-1605(1)(1) and (3) RCM (now codified as **39-31-401(1) and (5) MCA**). When the charged party having read the pleadings should have been aware of the issues which it had to defend, the Court held fair notice is given. The Court further held that if the District had doubts about whether coercion was at issue, upon request it could have obtained a more definite statement of the charges." **ULP #29-84**

"We agree that Young was discriminated against after this charge was filed. Since he could have amended his complaint to include that discrimination had it not already been part of his original complaint, and since the City could therefore not possibly have been prejudiced thereby, we reverse the District Court on this point and grant the cross-appeal. The order of the Board [of Personnel Appeals] is reinstated." **ULP #3-79 Montana Supreme Court (1982)**

See **ULP #20-78 and #23-80**.

"The Board's rules at **24.26.680 ARM** state that the complaint alleging an unfair labor practice shall contain "...a clear and concise statement of facts surrounding the alleged violation, including the time and place of occurrence of the particular acts and a statement of the portion or portions of the law or rules alleged to have been violated." **ULP #29-84**. See also **ULP # 33-84**.

"As a matter of law, Section **39-31-401(3) MCA** cited in the complainant's charge does not conform with the evidence nor with Complaint's narrative. A charge alleging a violation of **Section 39-31-401(5)** would conform with the

evidence and better conform with the charge's narrative. 'Actions before the Board are not subject to technical pleading requirements that govern private lawsuits**, *NLRB v. IBEW Local 112 (Fischbach/Lord Electric Company),* 126 LRRM 2292, CA 9 (1987)**. 'The importance of pleadings in administrative proceedings lies in the notice they impart to affected parties of the issues to be litigated at the hearing. Thus the pleadings are to be liberally construed to determine whether the charged parties were given fair notice. Fair notice is given if a charged party having read the pleadings should have been aware of the issues which it had to defend, ***Billings Board of Trustees v State ex rel. Board of Personnel Appeals,* 103 LRRM 2285, 604 P.2d 778, 185 Mont. 104 (1979)**' citations omitted." **ULP #34-87**.

"Since the issues concerning the IUOE and IBT were common and since some joint bargaining had occurred between the parties, the charges were heard concurrently." **ULP #7-89**.

The charge concerns "matters subject to the provisions of the Collective Bargaining Act and the jurisdiction of the Board of Personnel Appeals." **ULP #54-89**.

71.12: Filing of Charge – Notice to Other Party

"The Billings Education Association's complaint complied with the notice requirements of the Montana Administrative Procedure Act when it alleged that the mailing of individual contracts violated section 59-1605(1)(a) and (3), RCM 1947 (now **39-31-401(1) and (5)**), which prohibits coercion of employees in the exercise of certain rights protected by the collective bargaining law. The word 'coercion' is not a talisman without which the complaint fails. The allegations were sufficient to inform the board of trustees that the issue of coercion would be litigated." **ULP #17-75 Montana Supreme Court (1979)**

"The concept of actual notice [of the unfair labor practice] is subject to various interpretations. The critical point is when the action which comprises the unfair labor practice becomes 'unconditional and unequivocal.' Although there are cases to the contrary, ***NLRB v. IBEW Local 112*, 126 LRRM 2292 (CA 9 1987)**, and ***American Distributing Co. v. NLRB*, 715 F.2d 446 (9th Cir. 19483)**, best exemplify the position of this Board. *NLRB v. IBEW Local 112*, ... questions whether the statute of limitations is triggered when reduction of force cards are mailed or when actual layoffs occur. The board adopted the date of actual layoff because the ROF cards did not provide unequivocal notice to workers that their rights were being violated. It was not inevitable at the time of the ROF cards were issued that layoffs would occur. *American Distributing Co. v. NLRB*... is consistent with *IBEW Local 11 2*. It concerns an employer's discontinuation of contributions to the pension trust fund. The employer initially warned during collective bargaining agreement negotiations that when the bargaining agreement expired, contributions would no longer be made. Near the expiration

of the bargaining agreement, in February or March, the employer reiterated its stance. Union representatives did not learn until November that employer contributions ceased May 1st. The notice triggering the six month statute could not occur until after the employer ceased contributing. Therefore, the charge filed in December was timely. Analogously, actual notice did not occur here until after the first implementation of the leave without pay policy. Prior to that time, the employer's position was revocable. Thus, actual notice occurred when the Highway Patrol Division required the first employee to take a day's leave without pay." **ULP #17-87.**

71.13: Filing of Charge – Timeliness of Charge

"The Union's final fair labor practice argument is that the Board erred in considering only events that occurred more than six months prior to the time the charge against it was filed and that this violated Section **39-31-404**, which provides: 'No notice of hearing shall be issued based upon any unfair labor practice more than 6 months before the filing of the charge with the board….' (The language of the statute is confusing, particularly in its codified setting. The 'notice' referred to originally meant a notice of formal hearing given upon the filing of the complaint, no preliminary consideration of the Board being required…. In 1983 the law was amended … to provide for a preliminary investigation by an agent of the Board and a determination by the Board of 'probable merit' before the notice of formal hearing issued. [**39-31-705(3)**] To avert confusion, the section [**39-91-404**] should be amended to read: 'The Board shall not consider any unfair labor practice alleged to have occurred more than six months before the filing of the charge.' That is the meaning we attribute to the statute in the following discussion." **ULP #24-77 District Court (1985)**

"The Union argues [Section **39-31-404**] requires that an unfair labor practice charge be filed within six months after the grievance has arisen, and that there is no evidence of any unfair labor practice on the part of the Union within the six month period prior to filing of the charge…. This is simply contrary to the facts as disclosed by the record. The grievance was not a one-time affair that began and ended with McCarvel's request for assistance some seventeen months before he filed his charge. It was a continuing grievance that recurred every day that the Union refused to act." **ULP #24-77 District Court (1985)**

"I believe Section **39-31-404 MCA** is a statute of limitation on unfair labor practice charges, and not a general rule to exclude evidence that is more than 6 months old because of section **39-31-406(2) MCA**." **ULP #26-79**

"The following questions must be asked about the Defendant's motion: (a) When could the complainant first file the charges in this case? If the charges could have only been filed within the 6 months before they were filed, the motion [to dismiss the unfair labor practice] must be denied. (b) Are the charges

repeating and the gravaman are self contained within the 6 months before the charges were filed? If the evidence sheds light on the true character of matters occurring within the past 6 months and does not kindle a charge out of actions that happened more than 6 months before the charges were filed, the motion must be denied." **ULP #26-79**

"The [unfair labor practice] charges were filed within the 6 months after the City refused to bargain. Therefore, the motion [to dismiss the unfair labor practice] must be denied." **ULP #26-79**

Section "**39-31-404** requires an employee to file a charge within 6 months after an alleged unfair labor practice; it does not forbid the introduction of relevant evidence bearing on the issue of whether a violation has occurred during the 6-month period." **ULP #10-80 Montana Supreme Court (1982)**

"[T]he alleged unfair labor practice would not have occurred until the [coach's] salary was begun to be paid and when the Union had knowledge or should have had knowledge of that fact." **ULP #2-82**

"The inaction of a party is not limitless…. [There is a] six months limitation set forth in Section **39-31-404 MCA**." **ULP #31-82**

"It is true that the Complainant failed to file an amended charge within the limits set forth in the Investigation Report. However, the Complainant could have, had the untimely amended charge been dismissed, filed the charge anew within the 6 months limitation set forth in Section **39-31-401 MCA**. The re-filing of the same charge would have necessitated the entire process, up to the formal hearing, to be covered again in fruitless effort." **ULP #15-83**

"[W]e agree with the District Court that the unfair labor practice was a continuing course of conduct which began on March 5, 1976, when McCarvel received his first paycheck and the Union refused to file a grievance, and continued on until well past the time the unfair labor practice charge was filed in August 1977. Thus the charge was filed within the six month statute of limitations." **ULP #24-77 Montana Supreme Court (1986).**

"On March 7, 1985, Investigator Joseph V. Maronick issued a Report and Recommendation on the Investigation of Alleged Unfair Labor Practice dismissing the charge for the reason that it was not timely filed." **ULP #3-85**.

"In ***J. Ray McDermott & Company v. NLRB*****, ___F.2d___, 99 LRRM 2191 (5th Cir. 1978)**, the Appeals Court held when faced with an identical question in identical circumstances: 'This circuit has twice held that each refusal to bargain by an employer under a duty to bargain is a violation of the employer's duty, and that the passage of more than six months time from one such refusal does not bar action by the NLRB on a timely complaint based on a subsequent

refusal.... Our reasoning is not controlled by a conclusory labeling of the employer's duty or of his violation as a 'continuing' one. Rather, we recognize that the primary purpose of the six-month rule is to assure prompt adjudications of disputes based on fresh evidence. McDermott's refusal to bargain was based on motives contemporaneous with its refusal to bargain on April 21, 1976. The filing of a complaint on April 29, 1988 brought those motives into question, and was timely with regard to the unfair labor charge alleged....'" **ULP #10-86**.

"Pursuant to Section **39-31-404, MCA**, a complainant generally has six months from the time of the unfair labor practice in which to file its charge. There are several different tests which can be used to determine when the six month statute of limitations should commence. The test of preference, at least with respect to these facts, is the test under which the statute commences to run upon the receipt of actual notice of the unfair labor practice.... The first day of leave without pay was during the first week of January, 1987. The charge was filed five and one-half months later, June 17, 1987. The charge was timely filed." **ULP #17-87**.

"The question here is whether the statutory time began to run when MPEA first learned of the November 24 memorandum or when patrol officers were actually required to take leave without pay in January 1987.... [T]he limitations period did not begin to run until the first patrol officers took time off without pay in January 1987." **ULP #17-87 District Court (1989)**.

"[T]he Complainant did not actually realize the nonpayment of the MEA days until the payday of November 18, 1988. Therefore, the limitations period did not begin to run until that payday date. See also ***ULP No. 17-87, Montana Public Employees Association, Inc. v. Department of Justice, Highway Patrol Division [and Board of Personnel Appeals]*, Cause No. CDV 88-757, Montana First Judicial District, Lewis and Clark County [May 1989].**)." **ULP #12-89.**

"Section **39-31-404 MCA** provides: 'No notice of hearing shall be issued based upon any unfair labor practice more than 6 months before the filing of the charge with the board unless the person aggrieved thereby was prevented from filing the charge by reason of service in the armed forces, in which event the 6-month period shall be computed from the day of his discharge.... The Ninth Circuit Court of Appeals...held: '[N]otice of the intention to commit an unfair labor practice does not trigger section 10(b) [of the NL RA].' See ***National Labor Relations Board v. International Brotherhood of Electrical Workers, Local Union 112, AFL-CIO*, 827 F.2d 530, 534 (9th Cir. 1987); 126 LRRM 2293**. There the court agreed with the board that the limitations period began to run, not when workers received reduction in force cards, but rather, when the layoffs actually began to take effect." **ULP #12-89**.

See also **ULP #67-89**.

See also **ULP #54-89**.

71.15: Filing of Charge – Refiling or Amended Charge

"We agree that Young was discriminated against after this charge was filed. Since he could have amended his complaint to include that discrimination had it not already been part of his original complaint, and since the City could therefore not possibly have been prejudiced thereby, we reverse the District Court on this point and grant the cross-appeal. The order of the Board is reinstated." **ULP #3-79 Montana Supreme Court (1982)**

The Hearing Examiner denied the Employer's motion to dismiss one of the counts "on the basis that it occurred after the first charge was filed" because if the action were "proved, it would tend to show the continuing conduct of the employer which the complaint alleges as the basis for this charge." **ULP #23-80**

See also **ULPs #16-78, #20-78, and #15-83**.

"The wording on the unfair labor practice form together with **ARM Rule 24.26.680** both require that the complainant give 'a clear and concise statement of the facts constituting the alleged violation, including the time and place of the occurrence of the particular acts.' The complainant has failed to do so and it is hereby ordered to comply with the above ARM rule and amend its unfair labor practice." **ULP #33-84**.

71.16: Filing of Charge – Service

The Board of Personnel Appeals granted the County's Motion to Dismiss the unfair labor practice charges and vacated the election held in **UD #18-81** (which revoked the certification of AFSCME as the exclusive representative) because "a petition for unit determination filed by AFSCME with the Board of Personnel Appeals was served on Sheriff Onstad." The Gallatin County Commissioners were the proper parties which should have been served. "[S]ervice upon the sheriff was not sufficient to constitute service upon the county commissioners." **ULP #3-82**

71.17: Filing of Charge — Withdrawal

"During the course of the hearing on this matter, complainant...and the defendants resolved their dispute. Consequential to that resolution the parties signed a stipulation agreement wherein complainant...withdrew any unfair labor practice charges (**ULP 25, 39 and 46-87**) filed against the defendants. That stipulation agreement...was entered into the record of this matter." **ULP #24-87.**

71.211: Investigation and Complaint – Investigation – Burden of Proof [See also 09.3, 71.512, and 71.517.]

"[O]nce it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to some extent, the burden is upon the employer to establish that is was motivated by legitimate objectives since proof of motivation is most accessible to him.' [**NLRB vs. Great Dane Trailers, Inc. (1967) 388 U.S. 26, 65 LRRM 2465 at 2469**] **ULP #19-77**

See also **ULP #11-79**.

71.222: Investigation and Complaint – Complaint – Contents

The Hearing Examiner would not read into the Union's complaint of termination of the labor agreement an additional complaint on subcontracting because the Union did not know about the subcontracting when it filed the unfair labor practice charge. **ULP #18-78**

The Hearing Examiner did "not agree with the Employer's contention that this matter is moot…. Surely the Union is entitled to have the Board of Personnel Appeals decide whether at the time it happened, the Employer's action was an unfair labor practice." **ULP #2-82**

An unfair labor practice proceeding is not the forum in which to raise the question of whether or not an individual is a supervisor or management official. "The School Board … could have petitioned for a determination by the Board of Personnel Appeals or it could have forced the union to file a petition for a unit determination and an election." **ULP #29-82**

See **ULP #34-87**.

71.223: Investigation and Complaint – Complaint – Amendment

"We agree that Young was discriminated against after this charge was filed. Since he could have amended his complaint to include that discrimination had it not already been part of his original complaint, and since the City could therefore not possibly have been prejudices thereby, we reverse the District Court on this point and grant the cross-appeal. The order of the Board is reinstated." **ULP #3-79 Montana Supreme Court (1982)**

See also **ULP #15-83**.

"Amending charges subsequent to a formal hearing does not allow for due process in that opposing party does not have adequate notice." **ULP #13-90**.

See also **ULP #67-89**.

71.227: Investigation and Complaint – Complaint – Other

See **ULPs #14-74, #11-75, #12-75, #17-76, #29-76, #33-76, #37-76, #38-76, #8-77, #26-79, #47-79, #13-80, #15-80, #23-80, #38-80, #39-80, #10-81, #18-81, #19-81, #22-81, #30-81, #38-81, #43-81, #45-81, #2-82, #5-82, #27-82, #31-82, #3-83, #9-83, #13-83, #16-83, and #2-85**; and **DRs #1-76 and #2-76**.

"This appeal arises from Mr. Klundt's charges of unfair labor practices. The administrative hearing officer's recommendation that the charges be dismissed was adopted by the Board of Personnel Appeals (Board), and the Yellowstone County District Court affirmed the Board's decision. We remand to District Court." **ULP #38-80 Montana Supreme Court (1986)**.

See also **ULPs #3-85, #19-85, #19-86, #32-86, #14-87, #17-87, #24-87, #12-88, #19-88, #27-88, #32-88, #7-89, #12-89, #13-89, #14-89, #20-89, #31-89, #62-89, #64-89, #67-89, #3-90, #10-90, #1-91, #7-91, #8-92, #24-92, and #29-92**.

71.228: Investigation and Complaint — Complaint — Settlement and Stipulation

"Pursuant to agreement between the parties an evidentiary hearing was waived and stipulated facts were submitted to the hearing examiner." **ULP #31-89**.

71.230: Investigation and Complaint – Complaint – Other

"In view of the results of the election conducted by this Board on the Eastern Montana College campus resulting in the certification of the AAUP as the new bargaining agent, the issue in this declaratory ruling has become moot, and is therefore dismissed." **DR #2-77**

"I do not agree with the Employer's contention that this matter is moot…. Surely the Union is entitled to have the Board of Personnel Appeals decide whether, at the time it happened, the Employer's action was an unfair labor practice." **ULP #2-82**

"[T]he Board of Personnel Appeals did not hold a hearing for approximately three years after [Petitioner's] unfair labor practice was filed…. The Petitioner has failed to point out any statute or administrative rule which lends support to his position that it is the Defendant's responsibility to pursue the Complainant in setting a hearing date…. In addition, this Court feels that evidence exists to the effect that Petitioner did not intend to pursue the unfair labor practice until his discrimination charge before the Montana Human Rights Commission was decided adversely." **ULP #38-80 District Court (1985)**

"The matter was remanded by the Board of Personnel Appeals so that each party could 'fully present all relevant evidence including the matters pertinent to the actions of prior school boards in approving or disapproving these payments' [holidays]." **ULP #31-89.**

71.31: Hearing Officer – Authority

The Board of Personnel Appeals and its designated agents do not have the discretion to refer a matter to arbitration. **ULP #5-75**

Agents of the Board of Personnel Appeals cannot determine the "professional competency" of a grievant. They can only determine whether or not an unfair labor practice occurred. **ULP #5-75**

See also **ULP #8-75**.

71.33: Hearing Officer – Disqualification

"On January 10, 1983, this Board received a Motion to Disqualify Hearing Examiner from the Petitioners. By Order issued by this Board of January 25, 1983, James Gardner withdrew as Hearing Examiner in this matter." **DC #2-81**

"On April 4, 1989, the first hearing examiner appointed to hear the case was disqualified by the District pursuant to section **39-31-405(5) MCA.** The LEA disqualified the second hearing examiner on April 14, 1989." **ULP #13-89**.

71.5: Hearing

"On April 11, 1984, appellant began the present action alleging that . . the Board denied him a timely hearing in violation of his due process rights…. The Board failed to set a hearing for 37 months. The Board repeatedly stated that Klundt's charges had been put on hold at the request for the Union…. The requirements are the same whether dealing with an administrative agency or a court. Section **2-4-601, MCA**, and section **2-4-612(1), MCA**…. In this case the Board fulfilled the fundamental requirements of due process. Klundt received notice and was given an opportunity to be heard. The three-year delay is disturbing, but not fatal." **ULP #38-80 Montana Supreme Court (1986)**

71.51: Hearings — Conduct of Hearings

"The formal hearing was conducted under authority of Section **39-31-406 MCA** and in accordance with the Administration Procedure Act, Title 2, Chapter 4, MCA." **ULP #67-89**.

The Hearing examiner considered **ULP #62-89** and **ULP #64-89** simultaneously. **ULPs #62-89 and #64-89**.

71.512: Hearings – Conduct of Hearings – Burden of Proof [See also 09.3, 43.9, 71.211, 71.517, 72.31, 72.32, and 72.35.]

"If there is substantial evidence that an employee was illegally discharged for union activity, then the burden is on management to show the reason for discharge was not union related." **ULP #28-76**

"The U. S. Supreme Court in **NLRB vs. Great Dane Trailers, Inc. (1967) 388 U.S. 26 , 65 LRRM 2465** at 2469 … [stated that] 'once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to some extent, the burden is upon the employer to establish that it was motivated by legitimate objectives since proof of motivation is most accessible to him'." **ULP #19-77**. See also 2-85.

"Substantial evidence has been presented that the non-renewal of Mr. Carlisle's teaching contract was at least partially motivated by his union activities." **ULP #12-78**

"One significant difference noted between the Federal [National Labor Relations] Act and the Montana Act is with respect to the prosecution of unfair labor practice charges…. Here, the initial complainant in [the] case of a union or an employee retains both control and responsibility for the prosecution of the action before the Board and has the burden of sustaining its case by 'a preponderance of the evidence'." **ULP #11-79**

See also **ULP #3-79**.

"In ***Texaco, In.*****, 285 NLRB No. 45, 1126 LRRM 1001 (1987)**, the National Labor Relations Board held that the question whether an employer violated 8(a)(3) by its action of suspending benefits to disabled employees during a strike is governed by the test for alleged unlawful conduct set forth in ***NLRB v. Great Dane Trailers*****, 388 US 26, 65 LRRM 2465 (1967)**. Under the adopted test, the General Counsel meets its *prima facie* burden of proving some adverse effects of the benefits denial on employee statutory rights by showing '(1) the benefit was accrued and (2) the benefit was withheld on the apparent basis of a strike.' Once the General Counsel makes *prima facie* showing of at least adverse effect on employee rights, the burden then shifts to the employer to come forward with proof of legitimate and substantial business justification for its cessation f benefits. The employer may meet this burden by 1) proving that a collective bargaining representative clearly and unmistakably waived employees' statutory right to be free of such discrimination or coercion, or 2) by demonstrating reliance on a non-discriminatory contract interpretation that is reasonable and arguably correct and thus sufficient to constitute legitimate and substantial business justification for its conduct." **ULP #8-92**.

71.514: Hearings — Conduct of Hearings — Consolidation

See **ULPs #24-87, #19-88, #20-89, and #13-90**.

71.517: Hearings – Conduct of Hearings – Evidentiary Standards [See also 09.3 and 71.512.]

A lack of proper foundation for evidence exists when the purported author of its dead and there is no other evidence to show it is genuine. **ULP #5-75**

The report and final instrument for staff evaluation were admitted on the grounds that the subject matter is relevant to collective bargaining. **ULP #16-75**

Sections "**59-1607(1) and 82A-101© RCM 1947** … basically state the Board of Personnel Appeals is not bound by statutory or common law rules of evidence." **ULP #18-78**

"The City objected to the introduction of evidence on events subsequent to the filing of the unfair labor practice charge on the grounds that the charge, as filed, did not indicate that the alleged violation was a continuing one. The objection was properly overruled. To hold otherwise would require that Complainant file a charge after each proposal made by the City, if it believed the City was refusing to bargain in good faith…. [B]y the very nature of the charge the continuing conduct of the party against whom it is filed is obvious." **ULP #19-78**

"With the context of a motion for summary judgment which is to be denied if there is any question as to the existence of a material fact, this is a difficult standard to apply and one much like the duty of reasonable care in negligence actions." **ULP #11-79**

"Mindful of the command of our Court in the Anaconda [Co. vs. General Accident Fire and Life Assurance Corp. et al] decision that when in doubt, deny, and also mindful of the fact that a hearing must be had in any event, the State's Motion is denied." **ULP #11-79**

"A difference between the National Labor Relations Act and Montana's Act must be pointed out. The National Labor Relations Act provides that 'any such proceeding shall … be conducted in accordance with the rules of evidence … while Montana's Act provides 'in any hearing the board is not bound by the rules of evidence prevailing in the courts.' (Section **39-31-406(2) MCA**)." **ULP #26-79**

"The District Court's position on this issue was correct and the Hearing Officer should have included evidence of events occurring prior to Carlson's merit increase…. For this reason we remand this case to the Board of Personnel Appeals for consideration and a decision in light of events occurring prior to

Carlson's merit increase as well as subsequent happenings." **ULP #10-80 Montana Supreme Court (1982)**

See also **ULPs #20-78 and #18-82**.

"In answering the questions we must look to the subsequent events and the documentary evidence as well as the oral testimony." **ULP #19-85.**

The Board of Personnel Appeals' decision must be "supported by substantial credible evidence." **ULP #38-80 Montana Supreme Court (1986)**.

See also **ULPs #19-86, #32-86, #1-87, #14-87, #17-87, #24-87, #34-87, #12-88, #19-88, #27-88, #4-89, #14-89, #62-89, #64-89, and #67-89.**

The Board of Personnel Appeals modified the Hearing Examiners' Findings of Fact, Conclusions of Law, and Recommended Orders in **ULPs #17-87, #20-89, and #67-89**.

71.518: Hearings – Conduct of Hearings – Hearing Officer's Report

"This matter was deemed submitted the day the last brief was postmarked…." **ULP #5-82**

71.519: Hearings – Conduct of Hearings – Intervention

"**ARM 24.26.103** provides … that the right of intervention is discretionary and not mandatory or of right." **ULP #11-79**

71.522: Hearings — Conduct of Hearings — Waiver

"The parties waive a factual hearing on this matter and will submit briefs addressing the legal issue." **ULP #12-88**

71.7: Review by State Board of Hearing Officer's Report

"Having reviewed all pleadings in this matter, the Board of Personnel Appeals Orders as follows: (1) That the Board's Final Order, dated October 18, 1989 be rescinded. (2) That the Findings of Fact, Conclusions of Law and Recommended Order of the Hearings Examiner dated September 28, 1989, be adopted as the Final Order of this Board." **ULP #14-89**

71.71: Review by State Board of Hearing Officer's Report – Exceptions

The Board of Personnel Appeals "ordered that the record be returned to the Hearing Examiner for clarification and careful editing … [and] that the Board

defer action on this matter until a review is made by the Hearing Examiner and the Recommended Order resubmitted to the Board." ULP #34-78

71.711: Review by State Board of Hearing Officer's Report – Exceptions – Timeliness

"[S]ince the error was committed by the Board's own agent, it cannot hold the Defendant responsible and therefore denies the Motion to Dismiss Objections and Exceptions as Untimely." ULP #5-77

71.712: Review by State Board of Hearing Officer's Report – Exceptions – Content

See ULPs #17-75 and #17-77.

71.72: Review by State Board of Hearing Officer's Report – Standard of Review

See ULP #17-75.

71.8: Deferral to Arbitration [See also 47.54.]

See ULPs #5-75, #13-78, #3-79, #29-79, #5-80, #19-80, #34-80, # 18-81, #19-81, #43-81, and #3-83 and ULP #3-79 District Court (1981) and Montana Supreme Court (1982).

See **ULPs #6-86, #14-87, #19-88, #4-89, and #14-89**.

71.81: Deferral to Arbitration – Standards for Pre-Arbitral Deferral [See also 47.54.]

"[T]he NLRM's policy[is] to refrain from exercising jurisdiction in respect to disputed conduct which is arguably both an unfair labor practice and a contract violation when the parties have voluntarily established by contract a binding settlement procedure. [See Collyer Insulated Wire decision (1971).]" ULP #13-78

"Generally, the holding in Collyer established the following factors to determine whether deferral is appropriate: (1) the dispute must arise within the confines of a stable collective bargaining relationship, without any assertion of enmity by the respondent toward the charging party; (2) the respondent must be willing to arbitrate the issue under a clause providing for arbitration in a broad range of disputes, and (3) the contract and its meaning lie at the center of the dispute." ULP #3-79 and #13-78

As of 1977, deferral is "no longer appropriate in cases of alleged employer discrimination or interference with protected rights." ULPs#18-81 and #19-81

"Absent specific allegations of fact supporting a violation of sections 39-31-401(1) or (3), MCA, the Board of Personnel Appeals can defer under the Collyer policy." ULP #43-81

See also ULPs #19-80, #34-80, and #3-83.

71.811: Deferral to Arbitration – Standards for Pre-Arbitral Deferral – Amenability of Issues to Deferral

"In 1977, the National Labor Relations Board … held that deferral was no longer appropriate in cases of alleged employer discrimination or interference with protected rights." ULP #3-79

"[A]n employer's interference with the use of a contract's grievance/arbitration procedure constitutes grounds for denial or prearbitral deferral." ULP #5-80

"The Collyer decision emphasized that the prearbitral deferral process was appropriate where the underlying dispute centered on the interpretation of application of application of the collective bargaining contract…. In practical application, the factor requires that: (1) the contract contain language expressly governing the subject of the allegation, (2) the issue be deemed appropriate for resolution by an arbitrator, (3) the center of the dispute be interpretation of a contract clause rather than interpretation of prevision of the Act." ULP #43-81

"This issue in dispute is covered by the collective bargaining agreement between the parties to this matter…. That collective bargaining agreement contains a grievance procedure which culminates in final and binding arbitration…. Therefore the dispute is clearly arbitrable." ULP #43-1

"The dispute clearly centers on the interpretation of application of Section 11 of the 1980-82 collective bargaining agreement." ULP #43-81

"The dispute is eminently suited to the arbitral process, and resolution of the contract issue by an arbitrator will probably dispose of the unfair labor practice issue." ULP #43-81

"The dispute must center on the labor contract. In practical application, this factor requires that: (1) the contract contain language expressly governing the subject of the allegation, (2) the issue be deemed appropriate for resolution by an arbitrator, (3) the center of the dispute be interpretation of a contract clause rather than interpretation of a provision of the Act." ULP #27-82

"The National Labor Relations Board has not deferred in cases where: (1) the contract language on its face was illegal or may have compelled the arbitrator to reach a result inconsistent with the policy of the Act, (2) the respondent's argument constructing the contract language to justify its conduct was 'patently

erroneous,' (3) the contract language was unambiguous (and therefore the special competence of an arbitrator was not necessary to interpret the contract)." ULP #27-82

See also ULP #13-78 and ULP #3-79 Montana Supreme Court (1982).

71.812: Deferral to Arbitration – Standards for Pre-Arbitral Deferral – Authority of Tribunal Making Determination

The Board of Personnel Appeals and its agents do not have the power to defer matters to arbitration. ULP #5-75

"The Board clearly has the authority to hear this complaint under the provisions of Section 59-1607, RCM 1947. However, it is determined that the policies and provisions of the Act would best be effectuated if this Board were to remand this complaint to the grievance-arbitration procedure specified by the collective bargaining agent of the parties." ULP #13-78

"[I]f the Board of Personnel Appeals defers to arbitration pursuant to a contract, the Board of Personnel Appeals would not dismiss the unfair labor practice charges but instead would retain jurisdiction of the charges for purposes of insuring that arbitration in fact takes place and to determine whether the arbitration procedures were conducted fairly. Thus the defendant's motion to *dismiss* will not be granted even if the Board of Personnel Appeals does defer to arbitration." ULP #43-81

"This Board retains jurisdiction for the purpose of hearing this complaint as an unfair labor practice charge if: (1) the respondent does not … file a written statement…. (2) an appropriate and timely motion adequately demonstrates that this dispute has not, with reasonable promptness after the issuance of this order, been resolved in the grievance procedure or by arbitration; or (3) an appropriate and timely motion adequately demonstrates that the grievance or arbitration procedures were not conducted fairly." ULP #43-81

"The Board clearly has the authority to hear this complaint under the provisions of 39-31-403, MCA. However, it is determined that the policies and provisions of the Act would best be effectuated if this Board were to remand this complaint to the grievance-arbitration procedure specified by the collective bargaining agreement of the parties." ULP #27-82

"The Board retains jurisdiction for the limited purpose of entertaining a motion for further consideration of this case upon a showing of any of the following: (1) The respondent does not, within 20 days of receipt of this Order of Deferral, file a written statement with this Board indicating that it is willing to arbitrate this issue and to waive the procedural defenses that this grievance is not timely filed; (2) an appropriate and timely motion adequately demonstrates that this

dispute has not, with reasonable promptness after the issuance of the Order of Deferral, been resolved by an amicable settlement in the grievance procedure or by arbitration; (3) an appropriate and timely motion adequately demonstrates that the grievance or arbitration procedures were not fair and regular or reached a result repugnant to the purposes and policies of the Act; (4) an appropriate and timely motion adequately demonstrates that the grievance settlement or arbitration decision did not address and answer all the complaints alleged in the unfair labor practice charges." ULP #27-82

See also ULP #3-79.

71.813: Deferral to Arbitration – Standards for Pre-Arbitral Deferral – Availability of Arbitration

"One of the key elements of the Collyer Doctrine is the existence of final and binding arbitration in the grievance procedure…." ULP #34-80

"Even though a question of contract interpretation was the essence of this unfair labor practice charge, the matter was not deferred under the Collyer doctrine because the charge was brought by the Employer, who had no recourse to the contract's grievance procedure, and because the parties' contract did not provide for binding arbitration, a prerequisite for Collyer deferral." ULP #18-81

See also ULPs #13-78, #3-79 and ULP #3-79 Montana Supreme Court (1982). #19-81, and #43-81.

"[W]hen arbitration is not available, the Board has jurisdiction and responsibility to interpret and apply the Collective Bargaining Agreement and to resolve disputes arising therefrom. See ***NLRB v. C & C Plywood Corporation*, 64 LRRM 2065, 385 US 421**." **ULP #19-88**

See also **ULPs #14-87 and #4-89**.

71.814: Deferral to Arbitration – Standards for Pre-Arbitral Deferral – Positive Assurance Test

"There is no evidence that the parties' past or present relationship would render the use of the grievance-arbitration process futile." ULP #43-81

"The dispute must arise within the confines of a stable collective bargaining relationship, without any assertion of enmity by the respondent to the charging party. The National Labor Relations Board applies its 'usual deferral policies' if: '… there is effective dispute-resolving machinery available, and if the combination of past and presently alleged misconduct does not appeal to be of such character as to render the use of the machinery unpromising or futile…'." ULP #43-81

"There is no evidence that this dispute does not arise within the confines of a stable collective bargaining relationship." ULP #43-81

The National Labor Relations Board "has declined to defer … when … (1) the unfair labor practice charge alleged that there was no stable collective bargaining relationship, (2) the respondent's conduct constituted a rejection of the principles of collective bargaining or the organizational rights of employees, (3) the unfair labor practice charge alleged that the employer's conduct was in retaliation or reprisal for an employee's resort to the grievance procedure or otherwise struck at the foundation of the grievance and arbitration mechanism, (4) the employer had interfered with the use of the grievance-arbitration procedure." ULP#22-82

"This matter is not deferred to the party's grievance-arbitration procedure under the holding of the NLRB in ***United States Postal Service and Northwest Louisiana Area Local, Postal Workers, AFL-CIO*, 15-CA-7762 (p) 1984,270 NLRB 149**, because the City of Missoula refused to comply with the grievance settlement. Such refusal amounts to a renunciation of the entire collective bargaining process in violation of Section **39-31-401(5), MCA** and therefore the matter is not appropriate for deferral." **ULP #6-86**.

71.816: Deferral to Arbitration – Standards for Pre-Arbitral Deferral – Willingness of Parties to Arbitrate

"The respondent must be willing to arbitrate the issue which is arbitrable. Criteria related to this factor are: (1) the respondent must be willing to arbitrate and/or willing to waive the procedural defense that the grievance is not timely filed, (2) the dispute must be clearly arbitrable or at least arguably covered by the contract and its arbitration provision., (3) a final and binding procedure must exist." See also #43-81. See also ULP 43-81. See also ULP #27-82.

"Because the respondent cited the availability and appropriateness of the contractually agreed upon grievance-arbitration procedure as an affirmative defense to this unfair labor practice charge, and has moved to defer to arbitration pursuant to Collyer, it is assumed that the respondent is willing to arbitrate this issue and to waive the procedural defense that the grievance is not timely filed." ULP #27-82

See also ULPs #13-78 and #3-79 and ULP #3-79 Montana Supreme Court (1982).

71.817: Deferral to Arbitration — Standards for Pre-Arbitral Deferral — Other

"In the absence of deferral as a defense the NLRB has declined to defer to arbitration under *Collyer*.... See for instance, ***NCR Corporation and Airline and Steamship Clerks*, 117 LRRM 1062**." **ULP #14-89**

71.82: Deferral to Arbitration – Standards for Deferral to Arbitration Award [See also 47.54.]

"[T]here prerequisites for deferral to arbitration must be met. First, the arbitration proceedings must have been fair and regular; second, the parties must have agreed to be bound by the award; and third, the decision must not be clearly repugnant to the purposes of the National Labor Relations Act…. [If these requirements are] met, the NLRB will adopt the arbitration award as the complete remedy for [the] unfair labor practice [charge] related to the dispute." (See Spielberg Manufacturing Co., 112 NLRB 1080, 36 LRRM 1152 [1944].) ULP #39-80

An "employer's recalcitrance after arbitration [does] not preclude deferral to the award." (See IBEW Local 715 vs. NLRB, 85 LRRM 2823[1974].) ULP #39-80

The arbitration award met all the prerequisites of the Spielberg doctrine so the Board deferred to the award and required the Complainant to seek enforcement of the award in the courts. ULP #39-80

"This Board will review the issue of whether deferral to the arbitrator's decision should be made using the standards set forth in the Spielberg doctrine and not by use of the Olin Corp. [115 LRRM 1056 (1984)] doctrine. The Olin Corp. doctrine appears to be a radical departure from previous National Labor Relations Board precedent and is not necessarily the law. The Spielberg doctrine has been approved by the Courts and the Olin Corp. doctrine has not been approved by the Courts. This Board finds that the Spielberg doctrine is the applicable standard of review for determining when to give deference to an arbitrator's decision." ULP #3-83

71.821: Deferral to Arbitration – Standards for Deferral to Arbitration Award – Award Not Repugnant to Act

"In the case of Inland Steel Co., 263 NLRB 147, 117 LRRM 1193 (1982), the National Labor Relations Board set forth this test. '[T]he test of repugnance under Spielberg is not whether the Board would have reached the same result as an arbitrator, but whether the arbitrator's award is palpably wrong as a matter of law.' Examining the conduct of the association members who engaged in sabotage of institution property, hiding institution property, and using inmates from the institution to help is some of the conduct, and examining the arbitrator's decision, which affirmed with some modifications the institution's discipline of these members, we cannot conclude that the arbitrator's decision is palpably wrong under the Act." ULP #3-83

See also ULP #39-80.

71.822: Deferral to Arbitration – Standards for Deferral to Arbitration Award – Binding Nature of Award

See ULPs #39-80 and #3-83.

71.823: Deferral to Arbitration – Standards for Deferral to Arbitration Award – Consideration of Unfair Labor Practice Issues

In Atlantic Steel Co. 245 NLRB 814, 102 LRRM 1247 (1979), the National Labor Relations Board stated: "'[W]hile it may be preferable for the arbitrator to pass on the unfair labor practice directly, the Board generally has not required that he or she do so. Rather, it is necessary only that the arbitrator has considered all of the evidence relevant to the unfair labor practice in reaching his or her decision.' Employing the Atlantic Steel principle…. [the Board of Personnel Appeals found] that the arbitrator did consider all of the evidence relevant to the unfair labor practice charge in reaching his decision." ULP #3-83

"The arbitrator's award is not dispositive of the allegation that the Defendant committed an unfair labor practice, see ***Nevins v. NLRB*, 122 LRRM 3147, 796 F2d 14, CA 2 (1986)**; ***Taylor v. NLRB*, 122 LRRM 24, 786 F2d 1516, CA 11 (1986)**; ***Grand Rapids Die Casting v. NLRB,* 126 LRRM 2747, CA 6 (1987)**." **ULP #17-87**.

71.824: Deferral to Arbitration – Standards for Deferral to Arbitration Award – Fair and Regular Nature of Proceedings

See ULPs #39-80 and #3-83.

71.9: Petition for Hearing

"Respondents may, within 15 days from the date of this Order, make application to the Board in writing for leave to present additional evidence. The basis for said application shall be: (1) that due to limited preparation time respondents were unable to present such evidence at the hearing before the Hearing Examiner; and (2) … order said additional evidence be presented before the Hearing Examiner and made part of the record." ULP #4-73

Since no additional evidence was submitted by the Respondent, the Respondent's Exceptions were dismissed and the request for rehearing de novo was denied. ULP #4-73